IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1814 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes : YES

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? No : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? Yes : YES

5. Whether it is to be circulated to the Civil Judge? In view of the fact that such Bank's suits are many and after such questions are raised. Circulate all courts:

STATE BANK OF INDIA

Versus

GEMINI INDUSTRIES

Appearance:

MR PRANAV G DESAI for Petitioner

NOTICE SERVED for Respondent No. 1

MR SR SHAH for Respondent No. 6, 7

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE K.M.MEHTA

Date of decision: 22/08/2000

ORAL JUDGEMENT (per J.N. Bhatt, J)

By this appeal under Section 96 of the Code of Civil Procedure, the appellant original plaintiff, State Bank of India, has questioned the absolving of respondent Nos. 6 and 7 guarantors of cash credit transaction between the appellant and respondent Nos. 1 to 5 from payment of decreetal dues holding that there was no continuing guarantee. The parties are hereinafter referred to, as arrayed in the suit for the sake of convenience and brevity.

2. The plaintiff had to initiate a legal battle by filing Special Civil Suit No. 35 of 1983 in the Court of Civil Judge (S.D.) Kachchh, at Bhuj, against respondent Nos. 1 to 7 who are original defendants Nos. 1 to 7 in the suit for the recovery of the bank dues of Rs. 8,82,093.47ps together with interest at the rate of 15% per annum with effect from 1.4.1983 till date of payment from all the defendants jointly and severally pursuant to a cash credit loan transaction entered into on 19.10.1978 between the plaintiff bank and the original defendant Nos. 1 to 5. Original defendant No. 1 is partnership firm, whereas, original defendant Nos. 2, 3, 4 and 5 are partners of original defendant No. 1. Original defendant Nos. 6 and 7 are the guarantors.

3. Original defendant No. 1, on 19.10.1978, had drawn Rs. 1 lakh in the cash credit account. The defendants were, from time to time, utilising this facility and sometimes they were also depositing certain amounts in the cash credit account. The plaintiff bank as per the terms of the aforesaid general agreement revised the interest with effect from, 1.7.1980, and the defendants were informed accordingly.

4. Defendant No. 1 partnership firm was carrying on business of production of bicycle spokes and nipples and on its failure in the market, switched over to manufacture of stainless steel utensils and cutlery at Kandla Free Trade Zone. Defendant No. 1 firm through its partners, on 19.10.1981, approached the plaintiff bank with a request to finance their business by granting facilities under the Bank's Scheme for finance of Small Scale Industries which came to be accepted by the plaintiff bank and cash credit loan account was started with a limit of Rs. 1 lakh. An agreement known as `the General Agreement' for the grant of Small Industrial Advances and Hypothecation of Movables, Book debts and other assets on the terms and conditions incorporated therein was executed (which is hereinafter referred to as `the General Agreement' for the sake of brevity).

5. By executing the General Agreement, the defendants, inter alia, agreed and charged or hypothecated by way of first charge in favour of the plaintiff bank all their present and future goods, book debts, movables, machinery, furniture, store and other assets. The defendants had, also, agreed that in case of default by them, then the plaintiff, at their option, may take possession of the hypothecated properties or could get a receiver appointed and dispose of the hypothecated properties pursuant to clause 35 of the General Agreement. It was also agreed that by virtue of the General Agreement that the defendants shall pay interest at the rate of 11% per cent per annum or at such rates which would be determined by the plaintiff bank from time to time and if such rate is linked to the State Bank of India Advance rate obtaining at a particular time, any revision in the State Bank of India advance rate will correspondingly change the effective rate of interest on such account. The plaintiff bank was, also, entitled to charge at its own discretion such enhanced rate as it may fix, from time to time, on any irregularity as provided in clause (9) of the General Agreement. The conditions incorporated in the General Agreement are binding to all the parties. It is, only, in pursuance of the execution of the General Agreement by original defendant Nos. 1 to 5 and guaranteed by original defendant Nos. 6 and 7, the plaintiff bank agreed to grant accommodation by way of cash credit account against bills, invoices, railway receipts and other documents which purported to represent the rights or title to goods. As stated above, initially, such agreement was executed, on 19.10.1978, which is not in dispute.

6. In pursuance of the said General Agreement and supplemental agreement, cash credit account was secured by guarantee, of defendant Nos. 6 and 7, the appellants before us, which is produced, at Exh. 69. The plaintiff bank's case has been that the guarantee given by defendant Nos. 6 and 7 has been a continuing guarantee. It has, therefore, been the case of the plaintiff bank that the original defendant Nos. 6 and 7 have become answerable to the plaintiffs outstanding dues jointly and severally.

7. On 31.12.1980, cash credit facility granted to the defendants came to be confirmed and acknowledged by them in respect of the dues remaining on that date. On 24.7.1981, the defendant acknowledged their liability for payment in pursuance of the said General Agreement with interest in respect of all indebtedness and liability accrued for that purpose, under Section 18 of the Indian

Limitation Act. On 24.7.1981, the plaintiff bank acting under the terms of the General Agreement revised the rate of interest with effect from 2.3.1981 and defendants agreed to the same.

8. Defendant Nos. 1 to 5 were availing these facilities even after the change of production. They had also accordingly pledged the goods of new products on 24.12.1981. The total outstanding against the defendants as on, 3.3.1983, came to Rs. 8,82,093.47 ps. Since this amount, despite repeated demands, had not been paid, a suit came to be instituted on, 19.4.1983. Defendant Nos. 1 to 5 admitted the suit claim, whereas, defendant Nos. 6 and 7, in a composite written statement, at Exh. 63, disputed the said claim, inter alia, contending that the suit was time barred, that the guarantee agreement executed by them is not a continuing guarantee and therefore, they are not liable for suit dues. The plea of novatio was, also, raised.

9. In the light of the pleadings of the parties, the issue came to be settled by the Trial Court, at Exh. 64. Upon appreciation of the testimonial collections and documents the Trial Court decreed the suit claim in favour of the bank against defendant Nos. 1 to 5 and dismissed it against defendant Nos. 6 and 7. The suit came to be dismissed against defendant Nos. 6 and 7 by the Trial Court on the ground that defendant Nos. 6 and 7, though, were guarantors but are not liable for bank's dues as the guarantee agreement was not a continuing one. Therefore, this appeal is filed at the instance of the original plaintiff bank.

10. We have heard learned advocates appearing for the parties and we have, also, examined the documents produced before the Trial Court and relied upon by the parties.

11. Learned advocate Mr. Pranav Desai for the appellant has, seriously, criticised the approach of the Trial Court in dismissing the suit against the guarantors by contending that the guarantee of original defendant Nos. 6 and 7 is of continuing nature, whereas, learned advocate Mr. Shah for the original defendant Nos. 6 and 7, in this appeal, has supported the impugned judgement and decree by reiterating the contentions raised before the Trial Court and in the written statements. He has also placed reliance on a decision of this court in the case of `HIRALAL CHHOTALAL SHAH VS. CENTRAL BANK OF INDIA & ANR.' reported in 22 GLR 846, in support of his contention.

12. The controversy revolves round the nature of guarantee agreement and the resultant liability of original defendant Nos. 6 and 7 for the payment of suit claims. The Trial Court has dismissed the suit against them holding that Exh. 69 a deed of guarantee is not a continuing guarantee. Chapter VIII of the Indian Contract Act, 1872, (hereinafter referred to as `the Act') makes provision in relation to contract of indemnity and guarantee from sections 124 to 147 of the Act. Section 126 of the Act provides as to what is the contract of guarantee. It prescribes that a `contract of guarantee' is a contract to perform the promise or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the `surety', the person in respect of whose default the guarantee is given is called the `principal debtor' and the person to whom the guarantee is given is called the `creditor'. The plaintiff bank is a creditor and defendant Nos. 1 to 5 are principal debtors and defendant Nos. 6 and 7 are sureties. The question which has come up for our consideration and adjudication, in this appeal, is as to whether the liability of the defendant Nos. 6 and 7 as sureties, is extended or covered for the dues claimed in the suit.

13. In this connection, it will be interesting to refer to the provisions of Section 129 of the Act which prescribes as to what is a `continuing guarantee'. The guarantee which extends to a series of transactions is called a `continuing guarantee'. Section 130 of the Act provides for revocation of continuing guarantee. A continuing guarantee may, at any time, be revoked by the surety, as to future transactions, by notice to the creditor. No doubt, under section 131 of the Act, the liability of surety would come to an end upon his death in so far as the future transactions are concerned. Section 133 of the Act is, also, very relevant which provides as to when surety shall stand discharged. The discharge of surety by variance in terms of contract is, thus, provided in Section 133 of the Act. Any variance made without the surety's consent, in the terms of a contract between principal debtor and the creditor, discharges the surety as to transactions subsequent to variance. Whereas, Section 134 of the Act provides as to the discharge of surety in case of discharge of principal debtor which is not the facts situation in the present appeal. Sections 135 to 143 of the provide different contingencies and situations under which surety could stand discharged.

14. It would, also, be interesting to refer to the provisions of Section 18 of the Limitation Act, 1963 (hereinafter referred to as the `Limitation Act'), which provides for effect of acknowledgement in writing. Acknowledgement of debt in order to be, legally, effective is required to be made before the expiry of the period of limitations for suit or application in respect of such debt. What is the effect of payment on account of debt or of interest on legacy is provided in Section 19 of the Limitation Act and what is the effect of acknowledgement or payment by another person is provided in Section 20 of the Limitation Act. It has been contended that the suit claim is barred against defendant Nos. 6 and 7 not only on account of limitation but also on account of novatio and variance in terms of contract between the creditor and the principal debtors as agreement of guarantee was not renewed or no new such guarantee agreement was executed. Acknowledgment of debt made by the principal debtors, apart from being invalid, is not binding on defendant Nos. 6 and 7 as it was not made with their consent. It is, also, contended that the guarantee was limited to the extent of Rs. 1 lakh and not more. Such contentions raised on behalf of defendant Nos. 6 and 7 have been upheld by the Trial Court. The question is whether such contentions are legally valid or in other words, whether the findings recorded by the Trial Court upholding the contentions and dismissing the suit claim against defendant Nos. 6 and 7 are legal or valid or not.

15. With a view to appreciate the contentions advanced on behalf of original defendant Nos. 6 and 7 and accepted by the Trial Court, let us have a look into the original agreement of guarantee produced, at Exh. 69, and executed by defendant Nos. 6 and 7 in light of the aforesaid legal settings. Clause (2) of Exh. 69 reads as under:-

> "That the Guarantor(s) agree(s) that this guarantee shall be a continuing one notwithstanding that the said Cash Credit Account may at any time or from time to time be brought to credit until notice in writing that the same is closed is given by the Bank to the Guarantor(s)."

16. It could, very well, be seen that the guarantors have agreed that the guarantee shall be a continuing one notwithstanding that the said Cash Credit Account may at any time or from time to time be brought to credit until notice in writing that the same has been closed even by

the plaintiff bank to the guarantors. Statutory definition as given in Section 129 of the Contract Act, and the illustration provided under the said section are also self-evident and supporting the plea of the plaintiff and rebutting the pleas advanced on behalf of defendant Nos. 6 and 7. It is, very, clear that defendant Nos. 6 and 7, by virtue of the guarantee agreement dated, 17.11.1978, in respect of a cash credit facility of finance granted by the plaintiff bank to the debtors pursuant to an agreement executed by borrowers original defendant Nos. 1 to 5, dated 19.10.1978, in respect of an amount of Rs. 1 lakhs. In so far as the principal amount is concerned, the cash credit limit is prescribed to the extent of Rs. 1 lakh under the General Agreement and the guarantee given by the defendant Nos. 6 and 7 by virtue of guarantee agreement, Exh. 69, with reference to the General Agreement executed by the principal borrower. Therefore, we have not been able to comprehend the views recorded by the Trial Court in interpreting, Exh. 69, as limited guarantee and not as a continuing guarantee. There are as may as 15 clauses in the guarantee agreement, Exh. 69. We have dispassionately and threadbare considered the entire tenor of the guarantee agreement, Exh. 69, and we have no hesitation in recording our clear and evident conclusion that the view of the Trial Court in not treating the, Exh. 69, as a continuing guarantee is militating against the terms and clauses of the guarantee agreement, factually, and legally, in view of the provisions of Section 129 and 133 of the Act. So on both counts, contractually, as well as statutorily, the character, the nature and the type of guarantee agreement executed by the defendant Nos. 6 and 7 in favour of the plaintiff banks in relation to the General Agreement of cash credit loan account executed by the principal debtors is, undoubtedly, a continuing guarantee.

17. It would also be interesting to highlight while referring to clause (10) in Exh. 69 with reference to Section 133 of the Contract Act and as stated and seen hereinabove, Section 133 of the Act is prescribing the fact situations as to when discharge of surety takes place by variance in terms of contract. Section 133 of the Indian Contract Act reads as follows:-

"Section 133 Discharge of surety by variance in terms of contract: - Any variance, made without the surety's consent, in terms of the contract between the principal debtor and the creditor, discharges the surety as to transaction subsequent to the variance."

18. Clause (10) in the Guarantee Agreement Exh. 69 reads as follows:-

> "That notwithstanding anything contained in Section 133 of the Contract Act or in any other provision of law the Guarantor(s) will not claim to be discharged to any extent because of the Bank varying any of the terms and conditions whether contained in the General Agreement and Supplemental General Agreement if any and/or any Ancillary Agreement(s) or any other Agreement or letter or not and on which the facility by way of the said Cash Credit Account has been made to the Borrower and for this purpose and in particular any excess drawings over and above the sanctioned limit of the said Cash Credit Account allowed by the Bank at or without the specific request of the Borrower shall not discharge the Guarantor(s) from his/her/their liability."

19. The whole anatomy of the guarantee agreement leaves no any manner of doubt in our mind that it is nothing but a continuing guarantee and the plea raised by the defendant Nos. 6 and 7 is unjustified, unreasonable and illegal and wrongly relied upon by the Trial Court in holding that it is not a continuing guarantee.

20. Reliance placed on the decision of this Court in the case of HIRALAL CHHOTALAL SHAH (supra) by the learned advocate Mr. Shah in support of his contention is not helpful to the defendant Nos. 6 and 7 in the fact situation of the present case. The principle laid down in the said decision is based on the interpretation of the provisions of Section 134 of the Act and the provisions of Section 20 of the Limitation Act. It has been held that if the principal debtor making part payment of the acknowledged debt, such part payment or acknowledgement would extend the period of limitation only against principal debtor and not against surety and in a given case if the surety agreed to pay joint debt part payment or acknowledgement by one debtor cannot, ipso-facto, extend the period of limitation.

21. In other words, if the surety agreed to be treated as a joint debtor along with the principal debtor, the part payment or acknowledgement of liability by one of the joint debtors, namely defendant No. 1 in that case, could not, ipso- facto, extend the period of limitation against the appellant of that case. Therefore, even if the recitals in the surety bond would elevate the surety to the status of a joint promisor even then in the light of the provisions of Section 20(2) of

the Limitation Act, part payment by one of the joint debtors will not extend the period of limitation against the surety.

22. The learned counsel for the respondent has referred to the following submissions in Hiralal Chhotalal Shah's case (supra). He has submitted that this Court (Coram: S.B. Majmudar, J as he was then) after referring to Bombay High Court judgement in GOPAL DAJI SATHE VS. GOPAL BIN SONU AND OTHERS reported in 5 B.L.R. 1020 and another judgement of the Bombay High Court in the case of RAGHAVENDRA GURURAO NAIK VS. HAMIPAT KRISHNA SHOLTAPUR reported in AIR 1926 Bom. 244 and, also, after referring to other judgements of various Courts in page 856 held as under:-

> "In a contract of guarantee, the surety accepts his liability taking into consideration all the relevant facts as they exist at the time when the surety gives his guarantee. Subsequently, if the liability of the principal debtor is to be extended over a longer period for any rason, unless the surety has expressly consented to be bound by grant of such extension or has exhibited an unequivocal conduct to be so bound, he could not be held liable as a surety for the extended liability of the principal debtor.....
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> The view taken by the Bombay decisions insulates against such unjust results which may otherwise detract persons from being sureties and may elbow out these good sureties who agree to be sureties for saving financial embarrassments of others with whom but for the support extended by these reliable sureties, the creditors are not prepared to deal directly. Thus, even from the point of view of equity and justness, the contrary view was propounded by the Kerala and Calcutta High Court is not acceptable."

23. Mr. Pranav G. Desai, learned counsel for the petitioner has stated that the judgement of this Court in the case of HIRALAL CHHOTALAL SHAH VS. CENTRAL BANK OF INDIA & ANR. reported in 22 GLR 846 the Court was not concerned with continuing guarantee but an "ordinary guarantee". Section 129 of the Contract Act provides that a guarantee which extends to a series of transaction is called "continuing guarantee". In the case of MARGARET LALITA VS. INDO. COMMERL. BANK LTD. reported in AIR 1979 SC 102, the Hon'ble Supreme Court was

considering the question of "continuous guarantee" in relation to the Limitation Act. The fact situation was different in that case. The dispute in case on hand is revolving ground the nature and the character of the guarantee agreement. As we have noticed hereinbefore, in light of the textual, tenor and statutory mandate, the guarantee agreement, Exh. 69, is nothing but a continuing guarantee. Therefore, learned advocate Mr. Shah is not in a position to make any capital out of the said decision of this court.

24. After referring to the correspondence the Hon'ble Supreme Court has further observed in para 10 and such following observations are pertinent and expedient.

> "The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running limitation would only run from the date of breach under Art. 115 of the Schedule to the Limitation Act, 1908."

Again the Hon'ble Supreme Court in para 12 at page 108 has observed as follows:-

> "Thus far from repudiating her liability and breaking the contract of continuing guarantee, the defendant accepted her obligation under the guarantee bond in respect of the overdraft account which continued to be live at least upto 29th Sept. 1952. The suit which was filed on 8th November, 1954, was therefore clearly within time under Art. 115 of the Schedule to the Limitation Act, 1908."

25. The learned counsel further placed reliance on the decision in the case of PUNJAB NATIONAL BANK VS. B.C. MILLS reported in AIR 1970 SC 1973. The following observations may be noted, gainfully.

> "We are however unable to agree with the High Court that the suit filed was premature. The Bank was under the terms of the bond executed by

Ranjit Singh entitled to claim at any time the money due from the Company as well as Ranjit Singh under the promissory note and the bond. The suit could not, therefore, be said to be premature. The High Court instead of dismissing the suit should have stayed it till `the ultimate balance' due to the Bank from the Company was determined."

26. Similar view has, also, been taken in the case of UNION BANK OF INDIA, ERNAKULAM VS. T.J. STEPHEN reported in AIR 1990 KERALA 180. In para 21 of the judgement the Court held thus:-

"To sum up, we hold that in a case of a continuing guarantee so long as the guarantee has not been withdrawn or so long as the guarantors have refused to perform their obligation under the agreement of guarantee and a suit has been filed within the time prescribed under Art. 55 of the Limitation Act, the guarantors are liable for the agreement for the amounts found due to the creditor from the principal debtor."

27. The contention that the status or nature of the surety in view of the guarantee agreement would be that of a principal debtor or promisor and therefore the sureties would become co-promisors or co-debtors and one or some of the co-debtors not being party or acknowledgement or any variance in terms they shall stand discharged. This contention is also required to be repelled in view of the specific terms and conditions incorporated in guarantee agreement Exh. 69. In the case which is relied on, the contention raised on behalf of the surety was in view of the fact of that case, that the sureties were co-promisors and therefore they were not liable as they were not parties to the acknowledgement. Neither the bank has pleaded nor the Trial Court has held that the status of the sureties original defendant Nos. 6 and 7 is that of co-promissor or co-guarantor. In our opinion, there does not arise any question of defendant Nos. 6 and 7 being co-debtors or co-promisors in view of the unambiguous terms and conditions incorporated in continuing guarantee agreement, Exh. 69.

28. One more contention which was advanced before us

by the learned advocate Mr. Shah is in relation to provisions of Section 129 of the Act. He has contended that even if it is held to be an agreement of continuing guarantee as per the provisions of Section 129 of the Act continuing guarantee is in relation to transaction and not in relation to the period of limitation and therefore the period of limitation is required to be considered even in case of continuing guarantee, it does not override the period prescribed in the Limitation Act. This contention prima facie appear to be very alluring and attractive but not acceptable. In our opinion, considering the illustration in Section 129 of the Act and the settled proposition of law, act of acknowledgement by the principal debtors which is dated 24.7.1981 as per Exh. 75 and the suit has been filed on 19.4.1983, act of acknowledgement or revival of the General Agreement by virtue of Exh. 75 on 24.7.1981 is nothing but a transaction as contemplated in Section 129 of the Act. Therefore, the last transaction entered into by the principal debtor with the creditor plaintiff bank is within the period of limitation of three years before filing of the suit and therefore the last contention which is nothing but like a drowning man will try to catch a straw and therefore it is required to be rejected accordingly and it is rejected.

29. After having taken into consideration the facts and circumstances and the submissions raised before us and the aforesaid legal setting, the view taken by the Trial Court that there was no continuing guarantee is, with due respect, not only unreasonable, unjust but is illegal and therefore the appeal is required to be allowed setting aside that part of the finding recorded by the Trial Court.

30. In the result, the appeal is allowed. The dismissal of the suit by the Trial Court in so far as original defendant Nos. 6 and 7 guarantors are concerned, is quashed and set aside and they are held liable for the payment of the suit dues of the plaintiff bank as the guarantors of the defendant Nos. 1 to 5. The suit therefore shall stand decreed qua original defendant Nos. 6 and 7 with full costs of the suit as well as the appeal.

31. At this stage, learned advocate Mr. Shah for the respondent Nos. 6 and 7 has requested us to stay the execution of the modified decree against defendant Nos. 6 and 7 for a period of four weeks relying on the provisions of Section 151 of the C.P.C. This contention is opposed by the learned advocate Mr. Desai for the

appellant.

32 In light of the peculiar facts and special circumstances and the period spent in between the raising of the dispute and settlement by this court qua defendant Nos. 6 and 7 and that too again by placing reliance by learned advocate on exercise of inherent powers of the court under Section 151 of the C.P.C., we find that the submission raised before us is meritless and requires to be rejected. Accordingly it is rejected.

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